APPEAL NO. 92083
FILED APRIL 16, 1992

On February 5, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding as the hearing officer. The hearing officer decided that under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act), the respondent, claimant herein, is entitled to receive temporary income benefits (TIBS) from carrier, the employer's workers' compensation insurance carrier, beginning February 5, 1991, based upon the injury to his right elbow on (date of injury).

The hearing officer's prior decision that claimant did not sustain a compensable injury to his right elbow (contested case hearing held October 21, 1991) was reversed by Appeals Panel No. 2 in Texas Workers' Compensation Commission Appeal No. 91085, decided January 3, 1992, and the case was remanded for consideration and development of evidence on the issue of whether claimant is entitled to TIBS as a result of the injury to his right elbow. In arriving at his decision that claimant is entitled to TIBS, the hearing officer considered the evidence developed at the initial hearing on October 21, 1991, and the evidence developed at the hearing on February 5, 1992.

Carrier contends that the hearing officer erred in making Findings of Fact Nos. 8, 13, 14, and 17, Conclusions of Law Nos. 3 and 4, and in deciding that claimant is entitled to TIBS. Claimant, who was represented at the hearing, but is not represented on appeal, contends in his response that the evidence supports the hearing officer's findings, conclusions, and decision.

DECISION

The hearing officer's decision is affirmed.

The issue of whether claimant is entitled to TIBS as a result of the drilling rig accident involving his elbow on (date of injury), was somewhat complicated at the hearing due to the fact that claimant had asserted in another hearing that he also sustained compensable injuries to his back on the same drilling rig on February 4 and 5, 1991, and the medical reports from the doctor treating his back problem, which showed he was off work due to his back problem, were in evidence at the hearings concerning his elbow injury along with a medical report from the doctor treating his elbow problem, which showed he was off work due to his elbow injury. The hearing officer's decision that claimant did not sustain compensable injuries to his back on February 4 and 5, 1991, was affirmed by Appeals Panel No. 2 in Texas Workers' Compensation Commission Appeal No. 91085A, decided January 3, 1992. In this appeal, carrier does not assert that claimant's inability to obtain and retain employment at wages equivalent to preinjury wages, if any, was a result of claimant's back problems, as opposed to an elbow injury, but instead contends that there is no evidence to support the hearing officer's finding that claimant could not perform light duty work, and that

he failed to show objective medical evidence and did not produce an opinion, based upon reasonable medical probability, that he was incapable of working in the oil field.

When reviewing a no evidence point of error, we examine the record for evidence that supports the finding while ignoring all evidence to the contrary. *See* INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). When reviewing a question of the sufficiency of the evidence, we consider and weigh all of the evidence in the case and set aside the decision if we conclude that the decision is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 661 (1951). *See also* Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992.

The 1989 Act defines "disability" as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). An employee who has disability and who has not attained maximum medical improvement (MMI) is entitled to TIBS. Article 8308-4.23(a). Since there is no evidence to indicate that claimant has reached MMI, we look to the matter of disability as provided by Article 8308-1.03(16). *See* Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992.

In a contested case hearing held under Article 6 of the 1989 Act, the hearing officer is the trier of fact, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. R.J. McGalliard v. Kulman, 722 S.W.2d 694, 697 (Tex. 1987).

On (date of injury), claimant, who was employed as a drilling rig floorhand by (employer), was hit on his right elbow by a chain he was throwing around pipe to pull the pipe out of the hole. Claimant, who is right-handed, said he was able to use his right arm a little bit the rest of the day, but that his elbow got progressively worse and he had to start using his left arm to throw the chain. He worked a day or two more and then was scheduled to take several days off work. (The testimony is unclear whether it was five or seven days off.) He said he treated his right arm with "Icy Hot" and wore a bandage on his elbow while off work. He also said he did nothing while off work to injure his elbow. Claimant testified that on returning to work on February 3rd, his right arm got worse causing him to use his left arm to do some tasks, such as holding a tape to measure pipe, and using his left arm to scrub pipe when his right arm got tired. On February 5th he said he told the drilling rig toolpusher he had hurt his back and his elbow at work, and that the toolpusher sent him to a doctor the same day.

An undated report from Dr. S, which appears to relate to claimant's visit on February 5th, reflected that claimant told Dr. S that a chain had hit him in the right arm about one week prior to the visit and that he had a gradual increase in pain from his elbows to his fingers.

The report also noted claimant's complaints of back pain from falling on his buttocks. Dr. S diagnosed acute lumbar strain and tendinitis in the right elbow. His instructions and prescription were for moist heat treatments, pain medication, and light duty with no lifting greater than 25 pounds. The doctor suggested a follow-up visit with claimant's family physician within three to five days if there were no further problems. Claimant said he told Dr. S that he was in pain and could not do light duty work. He said the doctor told him he could probably do a job sitting down at a desk.

Claimant further testified that when he showed the driller on the crew, Mr. S, his release to light duty work slip on February 5th, the driller told him he could "scrub brush." Claimant said he told the driller he could not hold a scrub brush in his hand and that he, claimant, needed to see a specialist. When asked if he had refused light duty, claimant was somewhat equivocal in answering, but did state that "My body says no, to me it's not refusal," and that "To me, in my mind, it's not refusing - - my body could not do it." He explained that he did not want to lose his good paying job but his body could not do the light duty work that was offered him. Claimant stated he then told the toolpusher what the driller had said to him and that the toolpusher told him "to do what he had to do." Claimant left work on February 5th to go to see Dr. D in (city), Texas. Claimant said he did not return to work because he could not do the work of a floorhand with his elbow in the condition it was in. Claimant also testified that he could not scrub anything with a brush in his right hand, but that he could scrub with his left hand.

Medical reports from Dr. D revealed that claimant saw him on February 11, 1991, for evaluation of several injuries, including being struck on the right elbow with a chain and slipping and falling on the oil platform. Dr. D noted that claimant's complaints of right arm pain appeared to stem from his elbow injury and referred claimant to Dr. G for that problem. Dr. D diagnosed a "preexisting HNP" and left lumbar radiculopathy, and continued claimant off work. Claimant said he tried to see Dr. G in February 1991 for his elbow injury as recommended by Dr. D, but that he was unable to see him because carrier refused to pay for the doctor's visit. He said he had no money to see Dr. G until July 1991 when he visited that doctor at his own expense.

In a report dated July 15, 1991, Dr. G noted that Dr. D had referred claimant to him in early February for his elbow injury, but the referral was denied by the insurance company. He further noted that claimant was paying his bill himself for the July 15th visit so that he could have an evaluation of his right elbow. The history of the injury taken by Dr. G from claimant reflected that claimant "sustained a direct blow to the medial aspect of the right elbow with a chain on the job," and that "immediately after the injury [claimant] had severe pain that radiated from the medial aspect of the elbow down into the hand." Dr. G noted that claimant reported that the hand pain had subsided, but that he continued to have severe pain on the medial aspect of the elbow with radiation to the shoulder. Dr. G performed a physical examination and took x-rays of claimant's right elbow. The x-rays showed no apparent bone or joint abnormality. Dr. G's impression was that claimant appeared to have a contusion of the ulnar nerve of the right elbow. He stated that, by history, it was clearly a

result of the on-the-job injury claimant sustained on (date of injury), and that further work-up and therapy were indicated, and possibly surgical treatment. He further stated that: "The patient's symptoms are such that he is not capable of working in the oil field at this time on the basis of his elbow injury."

Claimant related that he had not had the money to see Dr. G after his one and only visit on July 15, 1991. He said that his "elbow disability" was worse than his back because his elbow had not been treated whereas his back had been treated. When asked if he was saying that he was "totally disabled" since February 5, 1991, as a result of the injury to his right elbow, claimant replied that "I'm claiming what my doctors are saying - - doctors have said I'm disabled," and added that Dr. D said he was disabled because of his back, Dr. G said he was disabled because of his elbow, and his psychiatrist said he was disabled from both. Medical reports from Dr. D revealed that claimant had been examined and treated by him for his back problem on several occasions from February 1991 through August 1991. In his August 1991 report, Dr. D stated that he understood that the insurance carrier denied claimant's treatment with Dr. G. Apparently, carrier was paying for claimant's treatment with Dr. D for his alleged on-the-job back injury. Dr. D issued several "Disability Certificates" which noted that claimant was "Totally Incapacitated" from February 11, 1991 through at least October 9, 1991.

Claimant also testified that he could not, as of the date of the hearing, work on an oil rig because of the shape his elbow was in, and that he became unable to work on February 5, 1991. He said he had been off work since February 5, 1991, that he could not work as of the date of the hearing, and that he didn't think he could get another job that would pay him as well as working on the oil rig. He acknowledged that he had not sought work since February 1991, but explained that his doctors had not released him to return to work and that nobody would take him with his bad back, bad elbow, and psychiatric care. (Claimant said he had been seeing a psychiatrist in connection with his back problems.) He said he had not applied for unemployment, but had, as of January 1992, obtained social security disability benefits for disability connected with his back, elbow, and psychiatric care. He said the social security benefits did not cover periods prior to January 1992.

Claimant acknowledged that, prior to his work-related accident on (date of injury), he had complained of an injury to his right elbow following an automobile accident in November 1990. He said the accident was not that bad and that after being treated in the emergency room hospital on the day of the automobile accident and given pain medication, he was released to return to work two or three days later. He said he never had problems on the job from the car accident.

Carrier offered no testimony or documentary evidence at the hearing but referred the hearing officer to Mr. S's testimony at the first hearing. At that hearing, Mr. S, who as the driller was claimant's immediate supervisor, testified that he saw a doctor's note which reflected that claimant could do light duty work with no lifting over 50 pounds for two or three days. He said that he told claimant he could do "scrub," that "scrub" constituted light duty,

although he said it is part of a floorhand's regular work duties, that the scrub brush weighs two pounds, and that there wasn't too much to scrub work. He stated that claimant told him he was hurt and could not work, that he was not going to scrub, and that he was going to see a doctor who knew what he, the doctor, was talking about. He said claimant complained about his elbow and his back. This witness related that claimant would have had to stand for up to 11 hours using a brush or deck broom and a bucket of water to scrub. He also said "I could have found dozens of other - he could have picked up trash," but did not state that such other tasks were ever offered to claimant as light duty work.

Medical reports from Dr. L reflected that he examined claimant on June 17, 1991, at carrier's request. His report of that date noted that claimant had claimed a back injury and an elbow injury, but his examination, impression, and recommendations related to only claimant's back injury. Dr. L's report of August 5, 1991, noted that it was not clear to him whether or not he was supposed to evaluate claimant's elbow on June 17th so he did not make a point of evaluating his elbow. In regard to claimant's elbow, he said that there was perhaps "a minimal question of some soft tissue irritation, such as epicondylitis . . ."

The challenged findings and conclusions are:

FINDINGS OF FACT

8.That the light duty available with the employer included the scrubbing of pipe which the claimant could not consistently perform using only one arm.

13.That on July 15, 1991, the claimant was not capable of working in the oil field on the basis of his elbow injury.

14.That from February 5, 1991 until July 15, 1991, claimant was not capable of working in the oil field on the basis of his elbow injury.

17.That the claimant is unable to obtain and retain employment at wages equivalent to his preinjury wage at the oil rig because of a compensable injury to his elbow.

CONCLUSIONS OF LAW

3.That the claimant's injury resulted in a disability that began on February 5, 1991.

4.That the claimant has proven by a preponderance of the evidence that he is entitled to [TIBS] beginning February 5, 1991.

In attacking Finding of Fact No. 8, carrier asserts that the evidence clearly demonstrated that there was other light duty available besides scrubbing down the pipe and

that claimant refused to do any light duty. Therefore, carrier contends that there was no evidence to support Finding of Fact No. 8 since there was never any testimony to indicate that claimant even attempted to do the light duty. We disagree with carrier's statement of the evidence concerning claimant's refusal to do any light duty work. The testimony of both Mr. S and claimant showed that the only light duty work offered claimant was "scrub" work. Although Mr. S testified that he could have found light duty tasks other than scrub work, there was no indication that anything other than scrub work was offered to carrier. Thus, carrier's statement that claimant refused to do any light duty is incorrect in that he could not refuse that which was not offered. At most, he refused to do that which was offered--scrub work.

We also disagree with carrier's assertion that there was "no evidence" to support Finding of Fact No. 8. Although carrier is correct in stating that claimant did not attempt to do the light duty, that is, the scrub work, claimant did testify that he had done scrub work, that he could not hold the scrub brush in his right hand to scrub, and that given the physical condition of his right arm, he was unable to do scrub work for a full shift. Mr. S's testimony showed that scrub work could entail scrubbing the rig for a period of 11 hours per day with a scrub brush and deck broom while carrying about a bucket of water. We believe that carrier's testimony as to his inability to do scrub work together with Mr. S's testimony concerning the requirements of scrub work, provide some evidence of probative value to support Finding of Fact No. 8. Thus, we overrule carrier's no evidence point.

Carrier asserts that Findings of Fact Nos. 13, 14, and 17, and Conclusions of Law Nos. 3 and 4 were made in error for the reason that claimant failed to show objective medical evidence and did not produce an opinion, based upon reasonable medical probability, that he was incapable of working in the oil field. Carrier points out that claimant did not see Dr. G until five and one-half months after his injury; that he exhibited a contusion at that time; that Dr. G did not have the x-rays taken by Dr. S on February 5, 1991; and that x-rays taken on July 15, 1991, showed no apparent bone or joint abnormality. Carrier also asserts that Dr. G's opinion is based on claimant's subjective symptoms, and that his records do not reflect that he had been advised that claimant had been released for light duty and offered light duty, and that claimant refused light duty.

We first note that "disability" as defined by Article 8308-1.03(16), is not premised on the inability to obtain and retain employment in the type of work the employee was doing when injured, but it is the inability to obtain and retain "employment" at wages equivalent to the preinjury wage because of a compensable injury. Thus, Findings of Fact Nos. 13 and 14 which relate only to claimant's ability to do oil field work, would not suffice to meet the requirements for disability. However, Finding of Fact No. 17 which finds that claimant is unable to obtain and retain employment at wages equivalent to his preinjury wage because of a compensable injury to his elbow, does include the criteria for disability as defined in the 1989 Act. Thus, Finding of Fact No. 17 supports Conclusion of Law No. 3 that claimant's injury resulted in disability.

Although claimant did not see Dr. G until five and one-half months after his injury, the evidence showed that he visited Dr. S within 10 days of his injury. Claimant explained that he attempted to see Dr. G in February 1991, based on a referral from Dr. D, but that he was unable to get an appointment at that time due to carrier's refusal to pay for the referral visit. Dr. G confirmed claimant's explanation for the delay in his report of July 15th. Dr. G did not have the x-rays taken by Dr. S, but his report noted he had the radiologist's report on those x-rays, along with x-rays taken on July 15, 1991, and that he considered the radiologist's report and the current x-rays in arriving at his diagnosis. Dr. G's report of July 15th noted that he had seen the previous medical records relating to claimant's right elbow and was aware of Dr. S's treatment for the elbow injury. Those same records note the release to light duty. Thus, it would be reasonable to conclude that Dr. G, through his review of the previous medical records, was aware of the release to the light duty work. Although Dr. G's report was available to all the parties at least since the date of the first hearing on October 21, 1991, apparently no one asked Dr. G if he was aware that claimant had been offered "scrub work," and whether or not his opinion as to claimant's inability to do oil field work would have been different had he been aware of that fact. The evidence showed that Dr. G did not release claimant for light duty work. The absence of an opinion by Dr. G as to whether he would have considered "scrub work" as light duty that claimant could perform, was a matter for the hearing officer to consider in assessing the weight to be given to Dr. G's opinion. Although Dr. G's opinion is based in large part on claimant's subjective symptoms of pain, he gave claimant a physical examination and recorded his findings on which he based his impression of a contusion of the ulnar nerve. Objective medical findings are not a prerequisite to a determination of disability. *See generally* Texas Workers' Compensation Commission Appeal No. 92030, decided March 12, 1992. Dr. G's impression and his opinion that claimant is not capable of working in the oil field because of his elbow injury stands, for the most part, uncontroverted. Dr. L's report did little to contradict Dr. G's impression inasmuch as Dr. L did not make a point of evaluating claimant's elbow.

In determining that expert testimony was not required to establish that carpal tunnel syndrome suffered by the claimant was the result of an electric shock, the court in Houston Independent School District v. Harrison, 774 S.W.2d 298 (Tex. App.-Houston [1st Dist.] 1987, no writ), stated that:

> Generally, the issues of injury and disability in a workers' compensation case may be established by testimony of the claimant and other lay witnesses. [citation omitted]. This rule applies even where such lay testimony is contradicted by the unanimous opinion of medical experts. [citation omitted]. An exception to the general rule exists where the subject is scientific or technical in nature such that jurors cannot form opinions based on the evidence as a whole and aided by their own experience and knowledge. [citation omitted].

We do not believe that expert medical testimony was necessarily required in this case to establish claimant's disability as defined in Article 8308-1.03(16), or a causal connection

between his injury and his disability, given the type of injury sustained and claimant's testimony concerning his inability to obtain and retain employment at preinjury wages. However, presupposing that expert medical testimony was required, Dr. G provided his expert medical opinion based on his evaluation of claimant's injury. We note that "reasonable medical probability" can be based upon the evidence as a whole. *See generally* Parker v. Employers' Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43, 48 (Tex. 1969); Atkinson v. United States Fidelity and Guaranty Co., 235 S.W.2d 509, 514 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). In this case, we are of the opinion that claimant's testimony coupled with Dr. G's unqualified, and for the most part uncontroverted, medical opinion that claimant was not capable of working in the oil field on the basis of his elbow injury presented some evidence of probative value from which the hearing officer could make Findings of Fact Nos. 13, 14, and 17, and Conclusions of Law Nos. 3 and 4. Finding No. 14 is also supported by claimant's testimony that he could not do the light duty work offered, and Finding of Fact No. 13 is further supported by the absence of a release to return to work after the date of claimant's visit to Dr. G. We are also of the opinion that those findings and conclusions, and the hearing officer's decision, are not so against the great weight and preponderance of the evidence as to be manifestly unjust.

The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Joe Sebesta
Appeals Judge